

Pendakwa Raya lwn Khairul Adli bin Ramli dan lain-lain**A**

MAHKAMAH TINGGI (KUANTAN) — PERBICARAAN JENAYAH NO 45—4
TAHUN 2003

HELILIAH H
25 JULY 2006

B

*Keterangan — Subahat — Sokongan — Sama ada saksi-saksi yang perlu untuk
pembentangan kes pendakwaan merupakan subahat — Nilai keterangan subahat*

C

*Undang-Undang Jenayah — Kanun Keseksaan — s 300 — Pembunuhan — Tiga OKT
dituduh membunuh dengan memukul si mati menggunakan beberapa peralatan —
Sama ada adanya perpaduan dalam pukulan mereka — Niat atau pengetahuan
ketiga-tiga tertuduh*

D

*Undang-Undang Jenayah — Subahat — Niat bersama — Sama ada saksi-saksi yang
perlu untuk pembentangan kes pendakwaan merupakan subahat — Nilai keterangan
subahat — —*

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Tiga OKT telah dituduh membunuh dan menyebabkan kematian ke atas satu Mohd Saiful Bahari bin Ghazali ('si mati'). Ketiga-tiga OKT dikatakan telah memukul si mati dengan menggunakan beberapa peralatan. Kes bagi pihak pendakwaan terletak di atas kenyataan SP7 dan SP9. SP9 yang keluar dari kereta bersama OKT1, OKT2 dan OKT3 dan melihat OKT3 memukul si mati, OKT2 memukul si mati dengan pahat besi dan juga OKT1 dan OKT1 menggunakan papan tanda 'No Parking' dan menghempaskannya atas si mati. Peguambela bagi pihak OKT1 dan OKT3 menghujahkan bahawa pukulan-pukulan dari ketiga OKT-OKT tidak menunjukkan adanya perpaduan (unity) dalam pukulan mereka dan juga OKT3 dengan menggunakan kayu cue snooker tidak menunjukkan adanya inferens bahawa OKT3 ingin melakukan pembunuhan. Pada keseluruhan, pembelaan yang dibangkitkan ialah: (i) niat untuk membunuh dinafikan dan tujuan menyerang si mati iaitu seorang yang telah menjadi sasaran adalah untuk menyelesaikan sesuatu; (ii) tujuan alat-alat digunakan ialah untuk mempertahankan diri di atas sebab mengikut versi ketiga-tiga OKT, si mati dan seorang rakan telah cuba menumbuk OKT1.

F**G****H****Diputuskan:**

- (1) Didapati sememang SP7 dan SP9 merupakan saksi-saksi yang perlu untuk pembentangan kes pendakwaan (witness necessary for the unfolding of the prosecution case). Namun kehadiran SP7 dan SP9 membangkitkan persoalan sama ada SP7 dan SP9 juga merupakan subahat (accomplice). Kedua-dua mereka telah hadir bersama tetapi tidak bertindak sesuatu untuk menghalang

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- A actus reus OKT1, OKT2 atau OKT3 dari peringkat awal lagi apabila si mati mula dikenai pukul (lihat perenggan 23).
- (2) Isu berhubungan dengan nilai keterangan (evidentiary value) subahat telahpun diputuskan dalam kes *Francis Anthony Samy v PP* [2005] 2 CLJ 481. Keterangan menyokong terdapat dari kenyataan saksi iaitu SP6. Keterangan
- B SP6 menyokong fakta bahawa OKT3 telah dilihat mengambil barang-barang kapak besi, besi pahat dan juga kayu snooker panjang dan satu lagi yang patah. Didapati juga kenyataan sokongan dari kenyataan SP12 yang berada bersama dengan si mati. SP12 telah menyatakan ia telah nampak tiga orang memukul si mati dan kawannya. SP12 menyatakan orang yang ditanyanya soalan berdiri di sebelah. Ini menyokong kenyataan SP9 bahawa dia hanya berdiri tanpa
- C membantu tiga yang lain memukul si mati. SP12 juga melihat si mati terjatuh dan ini adalah juga konsisten dengan kenyataan SP9. Dengan adanya keterangan sokongan SP6 dan SP12 itu didapati keterangan SP7 dan SP9 itu munasabah dan boleh diterima bahawa sememangnya OKT1, OKT2 dan OKT3 terlibat dalam menyerang dan memukul si mati, iaitu actus reus telah
- D dibuktikan (lihat perenggan 24, 27 & 29–30).
- (3) Seterusnya perlu pula ditimbang elemen mens rea dan juga soal pemakaian s 34 Kanun Keseksaan atau niat bersama untuk melakukan perbuatan di mana perbuatan itu telah menyebabkan kematian. Niat atau pengetahuan ketiga-tiga
- E tertuduh bukanlah sesuatu yang boleh dilihat tetapi perlu dinilai pada keseluruhan. Soal ini akan berubah mengikut fakta kes dan hal keadaan sekeliling kes. Perbuatan atau perlakuan ketiga-tiga tertuduh, termasuk alat-alat yang telah diguna serta kecederaan yang dialami oleh si mati wajar diberi perhatian (lihat perenggan 31 & 37).
- (4) Cara OKT1, OKT2 dan OKT3 menjejak langkah mangsa dan turun dari
- F kereta dan seterusnya satu persatu mengacukan pukulan yang menunjukkan sememangnya pukulan itu bukan tidak disengajakan ('unintentional' atau 'accidental'). Dari segi pembelaan peguambela-peguambela seolah-olah membangkitkan soalan bahawa tindakan OKT1, 2 dan 3 terhadap si mati
- G terjatuh di dalam lingkungan kecualian (exception) yang terdapat dalam s 300 KK. Melalui cadangan sahaja dibayangkan bahawa pengecualian keempat mungkin wajar dipertimbangkan. Setelah menimbang pembelaan yang diujahkan di dapati pihak pembelaan di atas imbangan kebarangkalian gagal menimbulkan apa-apa kenyataan yang menunjukkan adanya pertikaian di mana kecualian yang keempat terpakai di dalam kes ini (lihat perenggan 64,
- H 67 & 70).

[English summary]

- I The three accused were charged with murder for causing the death on one Mohd Saiful Bahari bin Ghazali ('the deceased'). The three accused were said to have hit the deceased by using various tools. The prosecution case were based on evidence by SP7 and SP9. SP9 had left in a car with OKT1, OKT2 and OKT3 and had seen OKT3 hit the deceased, OKT2 had hit the deceased with steel bar and OKT1 used a 'No Parking' sign to smash the deceased. The defence counsel for OKT1 and OKT3 submitted that the blows from the three accused did not show that there was unity

in their blows and that OKT3 used a snooker cue which did not show that there was an inference that OKT3 committed the murder. On the whole, the defence raised were: (i) intention to kill was denied and the reason for attacking the deceased who was targeted was to settle something; (ii) the reason for using the tools was for self defence as according to the three accused's version, the deceased and one of his friend tried to punch OKT1.

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Held:

- (1) Indeed both SP7 and SP9 were witnesses necessary for the unfolding of the prosecution case. However the existence of both SP7 and SP9 raised the question whether SP7 and SP9 were accomplices. Both were present together but had not acted to stop the actus reus of the three accused from the beginning when the deceased was first hit (see para 23).
- (2) The issue in relation to evidentiary value of accomplice had already been decided in the case of *Francis Anthony Samy v PP* [2005] 2 CLJ 481. The evidence supporting was provided by a witness SP6. The evidence of SP6 supported the fact that OKT3 was seen to have taken the tools, an axe, steel bar and also a long snooker cue and another broken one. Also from the supporting evidence of SP12 who was with the deceased. SP12 stated that he saw three people hitting the deceased and the deceased's friend. SP12 also stated the person whom he asked a question was standing next to him. This supported the evidence of SP9 who merely stood there without helping the three accused to hit the deceased. SP12 also saw the deceased fell and this was consistent with the statement by SP9. With the supporting evidence of SP6 and SP12, the court held that the evidence of SP7 and SP9 were reasonable and could be accepted that it was indeed OKT1, OKT2 and OKT3 who were involved in the attack and hit the deceased, ie actus reus had been proven (see paras 24, 27 & 29–30)..
- (3) The element of mens rea must then be considered and also the question of applying s 34 of the Penal Code or common intention to commit an act where the act had caused death. The intention or knowledge of the three accused were not something which could be seen but should be assessed as a whole. The question will change according to the facts of the case and the circumstances surrounding the case. The act of the three accused, including using the tools that they used and causing the injury suffered by the deceased ought to be taken into account (see paras 31 & 37).
- (4) The manner in which the three accused track down the deceased and got down from their car and then one by one hit the deceased showed that indeed the blows were not unintentional or accidental. From the defence, it seemed that the defence raised the question that the action of the three accused against the deceased fell within the exception contained in s 300 of the Penal Code. It was suggested that the fourth exception may be relevant for consideration. After considering the defence's submission it was found that based on the balance of probabilities, the defence had failed to show any evidence where the fourth exception could be used in this case (see paras 64, 67 & 70).]

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A Nota-nota

Untuk kes-kes mengenai niat bersama, amnya, lihat 4*Mallal's Digest* (4th Ed, 2005 Reissue) perenggan 1–13.

Untuk kes-kes mengenai s 300 Kanun Keseksaan, lihat 4*Mallal's Digest* (4th Ed, 2005 Reissue) perenggan 2219–2248.

B Untuk kes-kes mengenai sokongan dalam subahat, lihat 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) perenggan 5–36.**Kes-kes yang dirujuk**

Balachandran v PP [2005] 2 MLJ 301 (dirujuk)

Francis Anthony Samy v PP [2005] 2 CLJ 481 (dirujuk)

C *Namasiyiam v PP* [1987] 2 MLJ 336 (dirujuk)

PP v Awang Raduan Awang Bol [2005] 1 CLJ 654 (dirujuk)

PP v Aziz bin Mat Shah [2004] 4 MLJ 127 (dirujuk)

PP v Sundarti Supriyanto [2004] 4 SLR 659 (dirujuk)

Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37 (dirujuk)

D *Sainal Abidin bin Mading v PP* [1999] 4 MLJ 497 (dirujuk)

Tan Chee Wee v PP [2004] 1 SLR 490 (dirujuk)

Tan Chun Seng v PP [2003] 2 SLR 511 (dirujuk)

Tham Kai Yau & Ors v PP [1977] 1MLJ 175 (dirujuk)

Virsa Singh v State of Punjab [1958] SCR 1495 (dirujuk)

E *Yau Heng Fang v PP* [1985] 2 MLJ 338 (dirujuk)**Undang-undang yang dirujuk**

Akta Kenyataan 1950 ss 14, 27

Kanun Keseksaan ss 34, 299, 300(a), (b), (c), (d), 302

F *Tuan Ahmad Rosli bin Mohd Sham (Timbalan Pendakwa Raya) bagi pihak pendakwaan.*

Dato' Mohd Sofian bin Tan Sri Abdul Razak (Mohd Sofian & Co) dan Syed Azimal Amir bin Syed Abu Bakar (Syed Azimal Ramli & Rizal) bagi pihak tertuduh.

G Heliliah H:

[1] Pertuduhan terhadap ketiga-tiga OKT Khairul Adli, Noorazli, Mohd Aswadi ialah seperti berikut:

H Bahawa kamu pada jam di antara pukul 5.00 hingga 6.00 pagi, pada tarikh 25 Julai 2002, di tempat letak kereta, di belakang bangunan Kuantan Parade, di dalam Daerah Kuantan, di dalam Negeri Pahang, dalam menjalankan niat bersama kamu, telah melakukan pembunuhan dengan menyebabkan kematian ke atas Mohd Saiful Bahari bin Ghazali KP No 850820-11-5577, oleh itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan dan dibaca bersama dengan s 34 Kanun yang sama.**I**

[2] Mengikut pertuduhan itu pada 25 Julai 2002 di antara jam 5-6 pagi di tempat letak kereta di belakang Kuantan Parade, ketiga-tiga OKT yang ketika itu bersama dengan dua orang lagi yang menaiki motokar telah bertemu dengan si mati dan dua orang lagi rakan si mati. Ketiga-tiga OKT dikatakan telah memukul si mati dengan

menggunakan beberapa peralatan. Kes bagi pihak pendakwaan telah bermula dengan kenyataan saksi pendakwaan SP1 iaitu bapa kepada si mati yang bernama Mohd Saiful bin Ghazali. SP1 telah menyatakan bahawa lebih kurang jam 6.30 pagi pada 25 Julai 2002 itu beliau telah dimaklumkan oleh jiran bahawa anaknya yang bernama Mohd Azrul telah menelefon ke rumah jiran itu dan meminta SP1 supaya pergi ke hospital oleh kerana anaknya bernama Mohd Saiful (si mati) telah dimasukkan ke Hospital Tengku Ampuan Afzan Kuantan.

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[3] Di hospital SP1 berjumpa dengan anaknya Mohd Azrul dan seorang bernama Faizul. Mengikut Faizul, Mohd Saiful telah dipukul oleh beberapa orang. Pada jam 8 pagi doktor telah memaklumkan kepada SP1 bahawa anaknya telah meninggal dunia pada jam 8 pagi di hari yang sama.

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[4] Fakta kes yang dibentangkan bagi pihak pendakwaan seterusnya boleh diambil kira dari kenyataan SP7. Mengikut SP7 pada 24 Julai 2002 setelah balik daripada kerja malam beliau kemudian telah keluar ke bandar bersama-sama dengan OKT1 dan OKT3. Mereka bertiga menaiki kereta Kancil OKT1, iaitu kereta yang bernombor CBF 6342 dan pergi ke pusat snooker Capcon di Kuantan Parade, Jalan Sultan Ismail. Selepas masing-masing bermain snooker sehingga 3 pagi OKT1 dan OKT2 telah keluar bersama seorang yang lain yang kemudian juga memberi keterangan sebagai SP9. SP7 terus tinggal bermain snooker.

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[5] Lebih kurang 4.30 pagi OKT3 telah kembali ke Capcon dan mengajak SP7 keluar. OKT2 ketika itu juga berada di Capcon dan pada masa itu tidur. OKT2 juga diajak. Mengikut SP7 ia juga diajak keluar oleh kerana 'ada hal' dan semasa keluar itu OKT3 dikatakan membawa besi pahat (jack hammer), kayu snooker dan barang lain yang tidak dipastikan. Mereka seterusnya menaiki kereta OKT1. Semasa menaiki kereta itu SP7 dapati OKT1 dan SP9 juga ada dalam kereta.

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[6] Mengikut SP7 setelah mereka berputar keliling dalam kereta dia ada bertanya kenapa mereka berbuat demikian dan ada jawapan dari seorang daripada mereka yang tidak pasti, jawapannya ialah 'nak cari budak hisap gam'. Mereka kemudian terlihat lima orang yang dikatakan agak bising di Padang MPK dan di antara lima itu termasuk 'budak hisap gam'. Mengikut SP7 mereka kelima-lima telah menyusul mengikut 'budak hisap gam' ke arah Kuantan Parade, setelah kereta berhenti dikatakan OKT1, OKT2, OKT3 dan SP9 telah keluar dari kereta manakala SP7 mengambil alih tempat pemandu.

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[7] Kenyataan SP7 seterusnya membentangkan apa yang dikatakan telah berlaku terhadap 'budak hisap gam' atau si mati. SP7 mengatakan dia ada pandang ke arah OKT2 yang dikatakan ada di tangannya kayu snooker patah. Berikutnya SP7 telah mendengar bunyi kayu snooker patah. Dalam masa yang sama SP7 juga telah melihat OKT1 menghayun sesuatu ke atas badan si mati yang ketika itu berdiri dan akibatnya si mati terduduk. Dalam pada itu pula dikatakan OKT3 mengejar seorang lain yang dipukul. Ketika itu SP7 memusingkan kereta dan semasa itu juga dia menyatakan dia nampak seorang mengangkat besi parking yang seperti P22 dihempas ke arah badan si mati yang menyebabkannya terbaring.

I

- A** [8] Ketika itu juga kedua-dua rakan si mati berlari, seorang dikejar oleh OKT3 dan seorang lagi oleh OKT1. Kelima-lima mereka kemudian menaiki kereta untuk mencari dua rakan si mati yang telah lari itu dan setelah tidak dapat dicari, mereka kembali dalam kereta itu dan balik semula ke Kuantan Parade. Ketika itu kereta dipandu oleh SP7.
- B** [9] Setelah sampai balik di Kuantan Parade SP7 menyatakan OKT1 dan OKT2 dilihat menyepak badan si mati yang ketika itu masih terbaring. Kemudian OKT3 dikatakan mengutip kayu dan besi yang berada di sekitar dan membawa masuk ke dalam kereta.
- C** [10] Kenyataan SP7 juga merangkumi apa yang berlaku selepas insiden si mati dipukul. Mereka beredar ke Balai Polis IPD Kuantan yang terletak di sebelah Kompleks Teruntum. Bila sampai di Balai Polis hanya OKT1 dan SP9 turun. SP7, OKT2 dan OKT3 kembali ke tempat kejadian. Mengikut kenyataan SP7 si mati terbaring dan badannya ada banyak darah. OKT2 dan OKT3 ditinggalkan di situ.
- D** SP7 juga menyatakan bahawa alat-alat yang telah dikatakan diguna untuk memukul si mati telah disimpan oleh SP7 bersama OKT2 di bawah satu tiang elektrik di padang.
- E** [11] Kenyataan SP9 pula juga menerangkan keadaan sebelum insiden si mati dipukul. Mengikut SP9, dia tiba di Capcon dalam jam 1.25 pagi dan kemudian tiba pula OKT1 dan OKT3 bersama SP7. Mengikut SP9 dia bermain snooker, SP7 main mesin slot manakala OKT1 dan OKT3 main snooker. Lebih kurang jam 4.30 pagi SP9 meminta duit dari SP7 untuk mengisi minyak kereta. Kemudian SP9 keluar bersama OKT1 dan OKT3 untuk mengisi minyak kereta di Shell, Jalan Besar dan setelah beredar mereka terlihat tiga 'awek' (perempuan) di Taman Esplanade. OKT1 dikatakan telah menyapa tiga perempuan itu. Ketika itu mengikut kenyataan SP9 dia dan OKT3 masih berada dalam kereta. Ketika itu juga dikatakan seorang yang kemudian dipasti sebagai si mati dan seorang rakannya telah muncul dan di situ berlaku keadaan di mana OKT1 dipersoal sesuatu oleh orang yang kemudiannya dipasti sebagai si mati itu. SP9 tidak mendengar apakah diperkatakan.
- G** Namun selepas itu SP9 menyatakan bahawa si mati telah mengacu soalan 'berapa bulan tak bayar kereta?' dan OKT1 dikatakan menjawab 'bulan empat baru bayar' dan si mati telah membalas jawapan dengan mengatakan bahawa jika tidak dibayar dia 'nak tarik (kereta)'. Kemudian OKT1 kelihatan disuruh membuka boot kereta di mana si mati telah mengatakan 'nak bawa apa kayu baseball ke senapang'.
- H** Seterusnya si mati dikatakan telah membilang berapa orang berada dalam kereta dan kemudian mengatakan di belakangnya ada ramai lagi kawan-kawannya.
- I** [12] Selepas pada itu OKT1 telah menyuruh OKT3 memandu kereta balik ke Capcon untuk memanggil 'Ijan' (SP7) dan OKT2 dan ambil senjata iaitu kayu snooker, kapak dan besi pahat. Tiba di Capcon OKT3 telah membuat apa yang diarahkan iaitu memanggil SP7 dan OKT2 dan membawa 'senjata' turun. Mereka berlima iaitu OKT1, OKT2, OKT3, SP7 dan SP9 berada di dalam kereta ketika menuju ke Taman Esplanade. Mengikut SP9 ada sedikit perbualan dalam perjalanan di mana OKT2 disebut sebagai menyoal 'nak ke mana' dan OKT1 menjawab 'nak pergi bantai orang'. Seperti juga yang telah dinyatakan oleh SP7, SP9

mengatakan bahawa mereka telah melihat sekumpulan lelaki (lima orang) di padang MPK berdekatan dengan Kompleks Teruntum. Selepas itu di lihat seorang lelaki yang kemudian dipastikan si mati dan rakannya beredar menuju ke arah Kompleks Teruntum dan menghala ke Kuantan Parade. Mengikut kenyataan SP9 kereta yang dinaikinya itu juga menghala ke Kuantan Parade dan di belakang Kuantan Parade si mati telah kelihatan disertai dua rakannya. Kereta yang dinaiki itu dikatakan berhenti. Apabila SP9 keluar seorang dari rakan si mati telah bertanya 'Kenapa ni' dan SP9 berkata ia tidak menjawab. OKT3 pula ada juga bertanya sesuatu.

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[13] Kenyataan SP9 seterusnya menyatakan apa yang dikatakan berlaku kepada si mati. OKT3 dikatakan telah menghayun kayu snooker ke belakang badan si mati. OKT2 mengikut SP9 dilihat memukul si mati dengan pahat besi dua kali dan beliau menyatakan besi pahat terpelanting. Besi itu telah diambil pula oleh OKT1 dan si mati dipukul lagi dua kali. Kemudian OKT1 telah ambil besi parking dan menghempasnya atas si mati dua kali. SP9 juga melihat OKT3 mengejar seorang dari rakan si mati oleh kerana pada masa itu kedua-dua rakannya telah melarikan diri. Menurut SP9, SP7 telah memanggil SP9 dan OKT2 naik kereta untuk mengejar mereka yang berlari.

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[14] Dari kenyataan SP9 itu kelima-lima mereka telah naik kereta semula untuk mengesan rakan-rakan si mati yang telah melarikan diri dan setelah tidak dapat dikesan kembali ke tempat kejadian. OKT1 dan OKT2 dilihat oleh SP9 sekali lagi menyerang si mati dengan memijak mukanya. Kemudian mereka berlima sekali lagi beredar dari tempat kejadian.

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[15] Kenyataan SP7 dan SP9 ada meliputi penjelasan mengenai apa yang berlaku selepas mereka meninggalkan tempat kejadian tetapi ini akan dipertimbangkan di dalam konteks lain.

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[16] SP2 adalah pegawai penyiasat. Mengikut keterangan semasa itu bertugas pada 25 Julai 2002 beliau telah dimaklumkan oleh Chief Inspector Asmadi mengenai satu kejadian pembunuhan di bahagian belakang bangunan Kuantan Parade dan pada 10.45 pagi yang setelah menerima laporan dari SP1 beliau pergi ke tempat kejadian iaitu di belakang bangunan Kuantan Parade menghadap ke belakang Kompleks Teruntum. Di tempat kejadian beliau ada terlihat tumpukan darah, tiga serpihan kayu dan sepasang selipar warna biru jenama 'Bata'. Terdapat juga kayu snooker yang telah patah dan papan tanda 'No Parking'. Semua barang itu telah diambil dan beberapa gambar telah diambil oleh jurugambar. Satu sampel tompokan darah juga diambil dan semua barang yang telah dijumpa itu dibawa balik ke pejabatnya di Ibu Pejabat Polis Daerah Kuantan. SP2 juga menyatakan beliau telah menerima beberapa barang kes lagi daripada Chief Inspector Lias (kemudian SP5) yang merupakan satu batang besi pahat simen (jack hammer) satu kapak besi dan lima serpihan kayu di mana empat darinya warna sama manakala satu lagi lain. Semua itu telah dihantar ke Pejabat Kimia kepada En Khairul Hadi (iaitu SP4). Semua barang kes yang diperolehi telah dihantar ke Jabatan Kimia pada 30 Julai 2002 dan diterima balik pada 5 Mac 2003 dalam keadaan berseal.

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- A** [17] SP5 menyatakan bahawa pada 25 Julai 2002 beliau telah dipandu oleh seorang yang pada masa itu di dalam tahanan polis (dicamkan OKT2) ke Jalan Mahkota dan menemui kapak, besi pahat dan lima serpihan kayu cue snooker. Semua barang yang dijumpa kemudiannya diserahkan kepada SP2. Mengikut SP5 semasa barang itu dijumpa OKT2 telahpun diberi amaran mengenai haknya bagi maksud menjawab soalan.
- B**
- C** [18] Pada 25 Julai 2002 SP2 setelah menerima laporan dari ayah mangsa telah pergi ke tempat kejadian di belakang Kompleks Teruntum dan telah menjumpai antara lain tiga serpihan kayu, kayu snooker patah, satu pasang selipar getah jenis 'Batadan papan tanda 'No Parking' berdekatan tempat kejadian. SP2 juga telah melihat tumpahan darah kemudian bersama dengan barang-barang yang diperolehi dari SP5. Barang-barang itu telah diserahkan kepada SP4 di Pejabat Kimia Kuantan. SP4 melalui kenyataan menjelaskan bahawa dari beberapa analisis yang beliau jalankan ada beberapa serpihan kayu snooker di mana ada terdapat kesan darah manusia group A. Enam dari barang kes yang diterima iaitu eksh E4, E5, E13A–D
- D** adalah dari satu kayu snooker. E4, E13B, E13C, ada kesan darah manusia dari group A. Terdapat dua serpihan kayu snooker eksh E2 dan E.3 yang juga terdapat kesan darah tetapi serpihan ini adalah berlainan dan tidak dapat dipadankan dengan eksh E4, E5, E13A–D yang disebutkan.
- E** [19] SP4 juga menyatakan bahawa tiada terdapat kesan darah di besi pahat (eksh 11 atau chisel) dan juga di sebilah kapak. Di logam bulat papan tanda 'No Parking' eksh E14 ada terdapat kesan darah. Dari perbandingan serpihan kayu snooker SP4 menerangkan bahawa serpihan kayu E4, E5 dan E13A - D boleh digabungkan untuk menjadi satu batang kayu queue snooker. SP4 telah dibekalkan botol mengandungi darah manusia dan dari ujiannya beliau telah mendapati bahawa
- F** darah si mati terdiri dari group A. Pada penutupan kes pendakwaan terhadap tertuduh, beban pembuktian pihak pendakwaan ialah membuktikan kes prima facie. Elemen penting bagi s 302 Kanun Keseksaan ('KK') ialah yang berikut:
- (1) si mati telah meninggal dunia;
- G** (2) kematian itu disebabkan oleh kecederaan yang dialami akibat dari perbuatan ketiga-tiga tertuduh;
- (3) kecederaan itu disebabkan dalam mana keadaan seperti diperuntukkan dalam s 300 KK iaitu sama ada s 300(a), (b), (c) atau (d).
- H** Dari kenyataan SP8 pakar patologi dijelaskan bahawa si mati mengalami kecederaan luka calar dan lebam di bahagian belakang, tangan, muka serta kepala. Keretakan tengkorak di bahagian belakang kepala telah membawa kepada kematian si mati. Kayu snooker (P20) yang ada besi dalamnya, besi pahat (chisel) P18 dan papan tanda 'No Parking' (P22) boleh menyebabkan kecederaan yang dialami si mati.
- I** [20] Soalnya di sini ialah sama ada bukti yang diwujudkan oleh pihak pendakwaan menunjukkan bahawa perbuatan tertuduh-tertuduhlah yang menyebabkan kematian si mati. Kes pendakwaan sebagaimana telah diperinci di atas banyak terletak di atas kenyataan SP7 dan SP9. SP9 dari awal lagi bersama di dalam kereta dan telah memberi kenyataan tentang apa yang berlaku di mana berlakunya cemuhan atau tunjuk-menunjuk antara OKT1 dan si mati. SP9 menjadi saksi tentang

perkembangan peristiwa di mana SP9 bersama OKT1 dan OKT3 kembali ke Capcon dan OKT3 masuk untuk mengambil kayu snooker, besi pahat (atau chisel) simen serta kapak dan mengajak SP7 serta OKT2 ikut serta. SP9 dan SP7 merupakan saksi yang melihat sendiri 'eyewitness' kepada actus reus OKT1, OKT2 dan OKT3 terhadap si mati dan dua orang rakan.

A

[21] SP9 yang keluar dari kereta bersama OKT1, OKT2 dan OKT3 dan melihat OKT3 memukul si mati, OKT2 memukul si mati dengan pahat besi dan juga OKT1 dan OKT1 menggunakan P22, iaitu menghempaskannya atas si mati. Antara kenyataan SP7 dan SP9 yang dijelaskan juga mengesahkan ketika itu si mati telah terbaring.

B

C

[22] Ini juga bermakna SP7 dan SP9 hadir sepanjang apa yang diperlakukan semasa si mati dikatakan diserang.

[23] Didapati sememang SP7 dan SP9 merupakan saksi-saksi yang perlu untuk pembentangan kes pendakwaan [witness necessary for the unfolding of the prosecution case] Namun kehadiran SP7 dan SP9 membangkitkan persoalan sama ada SP7 dan SP9 juga merupakan subahat (accomplice). Kedua-dua mereka telah hadir bersama tetapi tidak bertindak sesuatu untuk menghalang actus reus OKT1, OKT2 atau OKT3 dari peringkat awal lagi apabila si mati mula terkena pukul.

D

E

[24] Dengan itu soalan yang muncul ialah apakah nilai keterangan (evidentiary value) yang boleh diletak ke atas kenyataan mereka. Isu seperti ini telahpun diputuskan dalam kes *Francis Anthony Samy v PP* [2005] 2 CLJ 481 yang membincangkan soal ini seperti berikut per Augustine Paul JCA (ketika itu) di ms 504–506:

F

The evidence in this case reveals that PW4 had no prior knowledge of the intention of the accused to commit the crime. He first knew of it when he saw the accused hitting the deceased at the rear of the car. Thereafter he assisted the accused actively in concealing the crime. The question that arises is whether on these facts he can be termed as an accomplice. In *Davies v Director of Public Prosecutions* [1954] 1 All ER 507 it was held that persons who are particeps criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact, are accomplices. In explaining the role played by these categories of persons the *Law of Evidence* by Woodroffe and Amir Ali, (16th Ed), Vol 4 says at pp 3434–5:

G

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'A principal of the first degree is one who actually commits the crime; a principal of the second degree is a person who is present and assists in the perpetration of the crime; an accessory before the fact is one who counsels, incites, connives at, encourages or procures the commission of a crime; everyone is an accessory after the fact to a felony who, knowing a felony to have been committed by another, receives, comforts or assists him in order to enable him to escape from punishment; or rescues him from arrest for the felony; or having in custody for the felony, intentionally and voluntarily suffers him to escape; or apposes his apprehension.

I

PW4 neither committed the crime nor did he assist the accused in committing it. Neither did he procure its commission. As he assisted the accused in concealing the crime

- A he is clearly an accessory after the fact. In commenting on the evidentiary value of the testimony of such a witness the Court of Appeal said in *Harcharan Singh & Anor v PP* [2005] 1 CLJ 11 at pp 19–20:

- B There is some controversy as to whether an accessory after the fact is an accomplice in the strict sense as he is not concerned in the original offence for which the accused has been charged. As *Sarkar on Evidence* (14th Ed), Vol 2 says at pp 1912–1913: In the penal laws of this country ordinarily two classes have been recognized: Persons who are principals (ie, directly or indirectly concerned in the offence) and abettors or instigators (ie, privy to the offence). The term ‘accomplice’ obviously includes principals in the first and second degrees as also abettors. An accessory after the fact is one who knowing a felony to have been committed receives, relieves, comforts, assists, harbours or maintains a felon.
- C In a case it was doubted whether an accessory after the fact is an accomplice (*R v Chutterdharee*, 5 WR Cr 59; see also *Nga Pauk v RA* [1937] R 513) but the Judicial Committee has held that he is (*Mabilikilili v RA* [1943] PC 4; 44 Cr U 1; *Mahadeo v RA* [1936] PC 242; 40 CWN 1164; see *Ismail v RA* 1947 L 220). An accessory after the fact being not concerned in the original offence for which the accused is tried, may not in the strict sense come within ‘accomplice’, but even in such cases there are exceptions,
- D eg, the possessor of stolen property soon after theft may be presumed to be the thief (v. ill (a) to s 114) and he is an accomplice in the case against the thief. All accessories after the fact are not of the same degree of criminality, as so much depends on the particular facts of each case. In many cases the question whether an accessory after the fact is or is not an accomplice in law may assume an academic form, the principal point to which consideration is applied being whether corroboration of his evidence is required.
- E Whether an accessory after the fact does or does not come technically within the category of ‘accomplice’ he is on the same footing as an accomplice and his evidence is no better. The presumption of untrustworthiness equally attaches to his evidence and on the same principle as that of an accomplice, the sounder rule would be to require corroboration (see *Alimuddin v R*, 23 C 361 post; *R v Kalu* A 397 O 259; *Shyan Kumar v RA* [1941] 0130; *Brijpal v RA* [1936] 0413; *Turab v RA* [1935] O 1; *Sundo Lai v RA* [1934] O 315; *Nawab v RA* [1923] L 391; *Bahawala v RA* [1925] L 432; Hay
- F

- G Strictly speaking an accessory after the fact cannot be an accomplice as he is not concerned in the commission of the original offence. In *Kuan Ted Fatt v PP* [1985] 1 MLJ 211 the Federal Court did not treat a witness who was present at the time of the commission of the offence as an accomplice as he had no prior knowledge that the offender intended to commit the offence charged. However, it can be safely stated that the question of whether an accessory after the fact is an accomplice is academic as his evidence must be considered on the same principles as that of an accomplice. Where he has played an active role his evidence must be corroborated. On the other hand if his role has been passive his evidence may be accepted with the usual corroboration warning.

- H [25] Mahkamah dengan ini bergantung kepada pemerhatian di dalam keputusan kes *Francis Anthonysamy*. Semasa disoalbalas oleh peguam bagi OKT2, SP7 menjawab bahawa ia menyangka rakan-rakan akan cuba bincang atau bergaduh apabila ditanya sama ada ia menyangka adanya pergaduhan. SP7 mengakui bahawa beliau tidak langsung keluar dari kereta semasa si mati dipukul dan beliau hanya mengalih-alihkan lokasi kereta.
- I

[26] SP9 sebaliknya berkata bahawa beliau tergamam di atas tindakan-tindakan OKT1, OKT2 dan OKT3. Pada keseluruhan didapati bahawa penjelasan SP7 dan SP9 boleh dipercayai setelah Mahkamah ini memberi ingatan bahawa adanya

keterangan menyokong. Soal keterangan menyokong juga dibincangkan dalam kes Francis Anthonysamy (supra) di ms 506–507:

In dealing with the nature of evidence that can be termed as being corroborative Lord Reading CJ said in *R v Baskerville* [1916] 2 KB 658 at p 667:

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

It was further held in that case (at p 667) that the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. In commenting on the same issue Sarkar on Evidence, 15th edn, Reprint 2004 Vol 2 says at p 2099:

The corroboration need not be of a kind which proves the offence against the accused. It is sufficient if it connects the accused with the crime (*Swaminathan v S AIR* [1957] SC 340). The corroboration need not consist of evidence which standing alone would be sufficient to justify the conviction. All that is required is that there should be sufficient corroborative evidence to show that the approver is speaking the truth with regard to the accused whom he seeks to implicate (*Bishnupada v. R AIR* [1945] C 411; *Autar Singh v S AIR* [1960] Pu 364; *Rameshwar v. S AIR* [1952] SC 54; see *Swaminathan v. S, sup; Ambika v 1270. R 35 CWN*).

[27] Didapati keterangan menyokong terdapat dari kenyataan saksi iaitu SP6. Keterangan SP6 menyokong fakta bahawa lebih kurang jam 4 pagi pada tarikh material itu OKT3 telah menggoncang pintu grill Capcon dan apabila SP6 membukanya OKT3 telah dilihat mengambil barang-barang kapak besi, besi pahat dan juga kayu snooker panjang dan satu lagi yang patah. SP6 yang bekerja di Capcon sebagai juruwang mengenali OKT3 sejak bangku sekolah lagi dan alat yang diambil oleh OKT3 iaitu kapak dan besi pahat itu ditinggal oleh seorang bernama Encik Albert yang sedang menjalankan 'renovation' di Capcon. SP6 juga mengesahkan OKT2 ada tidur ketika itu bersama SP7 dan OKT3 seterusnya telah mengejutkan OKT2 dan SP7 dan mereka semua turun dan selepas itu tidak lagi kembali ke Capcon.

[28] Didapati juga kenyataan sokongan dari kenyataan yang diuraikan oleh SP12. SP12 pada 24 Julai 2002 jam 11.30 malam telah berjumpa si mati dan seorang lain yang panggil ringkas sebagai 'Di' sahaja di suatu restoran. Mengikut SP12 si mati ada hisap 'gam' (dadah) dan mengesahkan sememang mereka bertiga ada di benteng dan telah tampil dekat tiga perempuan Melayu. SP12 juga menyatakan ada dua lelaki yang bercakap dengan perempuan-perempuan tersebut dan ada kereta kancil berdekatan depan lelaki.

[29] SP12 kemudian menceritakan scenario di tempat parking Kuantan Parade (tempat kejadian). SP12 menyatakan apabila sebuah kereta berhenti empat orang telah menuju ke arah si mati dan Di dan SP12 telah menegur seorang dari mereka. Ini adalah konsisten dengan apa yang dinyatakan oleh SP9. SP12 telah menyatakan

- A** ia telah nampak tiga orang memukul si mati dan kawannya. Di dengan 'batang kayu' snooker, besi parking dan besi (yang tidak dipastikan jenisnya). SP12 menyatakan orang yang ditanyanya soalan berdiri di sebelah. Ini menyokong kenyataan SP9 bahawa dia hanya berdiri tanpa membantu tiga yang lain memukul si mati. SP12 juga melihat si mati terjatuh dan ini adalah juga konsisten dengan kenyataan SP9.

- B**
- [30] SP12 mengakui telah menyatakan bahawa fikirannya bercelaru ketika itu tetapi tidak khayal. Dengan adanya keterangan sokongan SP6 dan SP12 itu didapati keterangan SP7 dan SP9 itu munasabah dan boleh diterima bahawa sememangnya
- C** OKT1, OKT2 dan OKT3 terlibat dalam menyerang dan memukul si mati, iaitu actus reus telah dibuktikan.

- [31] Seterusnya perlu pula ditimbangan elemen mens rea dan juga soal pemakaian s 34 Kanun Keseksaan atau niat bersama untuk melakukan perbuatan di mana perbuatan itu telah menyebabkan kematian.
- D**

- [32] Peguambela bagi pihak OKT1 dan OKT3 menghujahkan bahawa pukulan-pukulan dari ketiga OKT-OKT tidak menunjukkan adanya perpaduan (unity) dalam pukulan mereka dan juga OKT3 dengan menggunakan kayu cue snooker tidak menunjukkan adanya inference bahawa OKT3 ingin melakukan pembunuhan. Adanya niat bersama juga disangkal.
- E**

- [33] Timbalan Pendakwaraya pula menghujahkan peguambela-peguambela gagal menyentuh kenyataan SP6, SP7, SP9 dan SP12 pada keseluruhan. Beliau juga menggesa bahawa melihat pada jenis senjata yang digunakan dan penggunaan senjata-senjata itu pada keseluruhannya menunjukkan niat untuk menyebabkan kecederaan yang boleh menyebabkan kematian.
- F**

- [34] Pihak pembela cuba menimbulkan keraguan mengenai isu niat dan juga niat bersama bagi tujuan memenuhi elemen atau unsur yang terdapat di dalam peruntukan s 300 Kanun Keseksaan (KK). Objektif pembelaan ialah menarik perhatian mahkamah kepada perbezaan di antara s. 299 KK dan s 300 KK. Di sebaliknya pihak pendakwa menghujah bahawa ketiga-tiga OKT telah melakukan 'actus reus' yang menunjukkan secara terus atau secara inferens bahawa adanya mens rea mengikut authoriti kes *Sainal Abidin bin Mading v PP* [1999] 4 MLJ 497.
- G**
- H** Namun demikian saya tidak dapat menerima hujahan pihak pendakwa bahawa bahawa ketiga-tiga tertuduh menyebabkan kecederaan dalam semua keadaan seperti yang dipemntukkan dalam s 300. Adalah bertelaluan jika diterima hujahan bahawa mengikut keterangan yang dibentangkan adalah munasabah bahawa semua bahagian (limb) (a), (b), (c), atau (d) terpakai. Dalam hemat saya peruntukan yang paling
- I** wajar dipertimbangkan ialah bahagian (c) s 300 iaitu:

300 Except in the case, hereinafter excepted, culpable homicide is murder -

(a) ...

(b) ...

- (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
- (d) ...

A

[35] Pihak pembela juga didapati sengaja menimbulkan kekeliruan tentang identiti orang yang dipukul oleh ketiga-tiga tertuduh dengan menghujahkan bahawa kedua-dua SP7 dan SP9 tidak dapat mengecamkan gambar yang ditunjukkan, gambar 4A (iaitu gambar mangsa yang telah mati). Kenyataan SP7 ada mengatakan 'Saya nampak juga Azli (OKT2) menghayun sesuatu ke atas badan orang yang mati' dalam kes ini. SP9 telah juga merujuk kepada insiden yang berlaku di Esplanade di mana dalam keterangannya beliau telah mengenalpasti si mati orangnya yang telah menghampiri mereka dan menyatakan sesuatu kepada OKT1. Apa yang dikatakan oleh SP7 dan SP9 tidak boleh digunakan sebagai pengganti keterangan secara lisan bahawa SP7 dan SP9 telah masing-masing mengenal pasti siapa dia orang yang telah mati.

B

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D

[36] Adalah juga didapati keterangan SP6, SP7, SP9 dan SP12 wajar dipertimbangkan secara menyeluruh (in its totality) sebagaimana dihujahkan oleh Timbalan Pendakwa.

[37] Seterusnya element (atau ingredient) yang perlu diberi pertimbangan yang terperinci ialah isu mens rea. Niat atau pengetahuan ketiga-tiga tertuduh bukanlah sesuatu yang boleh dilihat tetapi perlu dinilai pada keseluruhan. Soal ini akan berubah mengikut fakta kes dan hal keadaan sekeliling kes. Perbuatan atau perlakuan ketiga-tiga tertuduh, termasuk alat-alat yang telah diguna serta kecederaan yang dialami oleh si mati wajar diberi perhatian.

E

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[38] Saya berpandangan bahawa keadaan keseluruhan dan fakta yang berikut adalah relevan:

- (a) Selepas insiden yang dikatakan tunjuk-menunjuk OKT1 dikatakan mengerahkan OKT3 dan SP9 kembali ke Capcon untuk mengambil peralatan yang sememangnya telah diambil. OKT3 juga disuruh memanggil SP7 dan OKT2
- (b) Dalam kereta ada keterangan bahawa apabila OKT2 bertanya mereka arah ke mana, jawapannya dari OKT1 ialah 'nak pergi bantai orang'. Masa SP7 diajak turun bersama, OKT3 ada mengatakan sebabnya ialah 'ada hal'. SP7 juga menyatakan apabila dia bertanya kenapa mereka berputar-putar dengan kereta, jawapannya dari seorang dari mereka yang tidak dikenalpasti ialah 'nak cari budak hisap gam'. Keterangan seperti ini didapati relevan dipertimbangkan di bawah seksyen 8(1) Akta Kenyataan 1950 dan dibaca bersama keterangan (Explanation 1) pada seksyen itu. Seksyen 14 Akta Kenyataan 1950 (Explanation 1 illustrasi p) juga boleh dipertimbangkan.
- (c) Tindakan mengesan jejak langkah orang yang dikatakan 'budak hisap gam' telah diuraikan dalam keterangan SP7 dan SP9 sehingga orangnya ditembung dan diekori ke tempat berlakunya insiden 'budak hisap gam' dipukul.

G

H

I

- A** Keterangan keseluruhan menunjukkan ‘budak hisap gam’ adalah seorang yang dikenali di antara kelima mereka. Ini jelas bukan sahaja dari keterangan SP7 dan SP9 tetapi juga keterangan SP12 yang melihat dengan sendiri bahawa kawannya yang disahkan ada menghisap gam (iaitu si mati dan seorang yang dikenalpasti sebagai Di telah dihampiri oleh empat orang dan mula dipukul. Keterangan SP12 menunjukkan tiga orang telah bertindak untuk memukul si mati (Saiful).
- B**
- (d) Keterangan SP9 menyatakan OKT3 menghayun kayu snooker dan kena pada belakang badan si mati, OKT2 memukul si mati dengan besi pahat. OKT1 kemudian mengambil alat yang sama dan memukul si mati dua kali dan kemudian disusuli pula dengan OKT1 mengambil besi tanda ‘No Parking’ dan menghempaskannya ke atas badan si mati dua kali.
- C**
- (e) Mengikut keterangan SP9 juga seorang rakan si mati dikejar oleh OKT3. Selepas rakan-rakan si mati dikejar dalam kereta, mereka secara kumpulan telah kembali ke tempat kejadian dan OKT1 dan OKT2 dikatakan telah memijak muka si mati.
- D**
- (f) Mengikut keterangan SP7 jelas apa yang diperlakukan terhadap si mati yang melibatkan OKT1, OKT2 dan OKT3 walaupun ia tidak mengkhususkan siapa menggunakan apa. Tetapi seperti SP9, SP7 menerangkan bahawa OKT1 dan OKT2 menyepak si mati apabila mereka kembali ke tempat insiden pada kali yang kedua setelah mereka gagal mengejar rakan-rakan si mati.
- E**
- (g) Keterangan SP7 menunjukkan selepas insiden OKT3 ada mengumpul alat yang digunakan untuk memukul si mati dan kemudian bersama OKT2 diletak di bawah satu tiang elektrik di Padang MPK setelah melihat keadaan si mati. SP7 juga menjelaskan sungguhpun dia tidak mengenali si mati secara peribadi ia ada melihat si mati satu hari sebelum insiden. Aspek ini juga disentuh di dalam kenyataan SP5 sebagaimana dihuraikan sebelum ini di mana OKT2 telah memandunya ke tempat di mana kapak, besi pahat dan serpihankayu dijumpai. Kenyataan ini diterima masuk mengikut s 27 Akta Kenyataan 1950 sebagaimana dibincangkan dalam kes *Francis Anthonyamy (supra)* juga iaitu di ms 502–503:
- G**
- We pause to add that the accused had supplied information to the police twice with regard to the burying of the head. The law relating to the admissibility of such information was considered by the High Court in *PP v Hashim bin Hanafi* [2002] 4 MLJ 176 at pp 187–188:
- H**
- The section provides that ‘... so much of such information... as relates distinctly to the fact thereby discovered, may be proved’. It follows that the information that is admissible must relate distinctly to the fact discovered. It was made abundantly clear by the Privy Council Pudukuri Kotayya & Ors that it is fallacious to the ‘fact discovered’ as equivalent to the object produced; the fact discovered embraces the place from which the object is produced, and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. The discovery must be the direct cause of the information (see *Jaffer Husain Dastagir v State of Maharashtra AIR* [1970] SC 1934). Thus the information must relate to the place of concealment of the object and the accused’s knowledge of it. What is admissible is therefore information supplied by the accused which relates to the exact location of the object and its subsequent discovery. Since the information supplied by the
- I**

accused must lead to the discovery of the object it means that the discovery must be of some fact which the police had not previously learnt from other sources and the knowledge of the fact should be first derived from information supplied by the accused (see *Thimma v State of Mysore* AIR [1971] SC 1987; *Joy v CI of Police* (1989) 1 KLT 443 (Ker). Thus the discovery must be made by virtue of and exclusively as a result of information given by the accused (see *Ramjan Das v State* [1988] 1 Crimes 843). In this regard Nik Hashim J said in *Public Prosecutor v Kanapathy all Kupusamy* [2001] 5 MLJ 20 at p 28:

To constitute 'information' under the section, the information must come from the accused and nobody else

If the police have prior knowledge of the information supplied by the accused, obviously the subsequent discovery will be based on such prior knowledge and not on that of the accused. It will thus render the information supplied by the accused inadmissible as it will not be the cause of the discovery. It must be remembered that s 27 is based on the view that if a fact is actually discovered in consequence of information given some guarantee is afforded thereby that the information is true, and accordingly can be safely allowed to be given in evidence (see *Pulukuri Kotayya & Ors*). It follows that prior knowledge which will make s 27 inapplicable must be of such a nature that it must be capable on its own of leading to the discovery of the object. If it does not have that effect then the cause of the discovery will still be the information supplied by the accused and not the prior knowledge of the police. In that event, the information supplied by the accused will be admissible as the information that the police have will not amount to prior knowledge. The corollary is that information that the accused has drugs or has hidden the drugs without any further information on their exact location will not amount to prior knowledge. In support, I refer to *Md Desa bin Hashim v Public Prosecutor* [1995] 3 MLJ 350 where Gopal Sri Ram JCA said at p 360:

If an investigating agency has prior knowledge of the whereabouts of the article that is recovered, then the section does not apply

The 'whereabouts' of an article is a reference to its exact place of location. In further support, I refer to the Indian Supreme Court case of *Aber Raja Khima v State of Saurashtra* AIR [1956] SC 217 where it was held that discovery of hidden incriminating articles said to have been recovered by the accused is inadmissible if the police already knew where they were hidden. As s 27 has no application where the investigating agency has prior knowledge of the whereabouts of the object that is recovered it follows that where the accused makes more than one statement it is only the first statement that is admissible; the second is not (see *Md Desa bin Hashim*). This is because the second statement is a mere repetition of the first statement of which the police already have knowledge. However, if the first statement of the accused is vague and the precise information is received as a result of a subsequent statement by him, it is the latter that is admissible (see *Vinayak Joshi v The State* AIR 1968 Pun 120). This is for the obvious reason that the first statement, being not precise, is not the cause of discovery and is therefore not admissible. When the information contained in the statement of the accused does not disclose the exact place where the object was kept concealed by him then even if the object is recovered it cannot be said that it was recovered pursuant to the information furnished by the accused (see *Paramasivan v State* [1990] Cr LJ 1491; *State v Ram Ch* AIR [1965] Or 175; *Orissa v Nursingha* [1990] Cr U 1676).

- A (h) SP7 ada menyatakan bahawa setelah OKT3 mengutip senjata kelima-lima mereka menaiki kereta semula dan semasa itu OKT1 mengatakan dia ingin membuat report. Aspek ini juga disokong dalam keterangan SP9 yang menunjukkan bahawa report yang hendak dibuat ialah 'cover report' iaitu kononnya OKT1 telah diperas-ugut (di'pau' di insiden di Esplanade).
- B Mengikut SP9 OKT1 ada menyebut kepada SP7 dan OKT2 bahawa dia ada membuat report dan mengajak mereka 'mengiakkannya' juga.
- (i) Didapati apa yang dihuraikan dalam para (g) dan (f) di atas diterima masuk mengikut s 14 Akta Kenyataan 1950 'as facts showing the existence of any state of mind such as intention.'

- C [39] Dari soal-soal yang dikemukakan oleh pihak pembela jelas peguam- peguam bagi OKT1, OKT2 dan OKT3 cuba menimbulkan isu bahawa tindakan yang diambil tidak menunjukkan pra-rancangan [pre-arrangement] di antara OKT1, OKT2 dan OKT3 dan tidak serentak (not in unison). Kedua isu boleh diambilkira setelah mengambil ingat keputusan di dalam kes *Sainal Abidin bin Mading v PP* [1999] 4 MLJ 497, p 505 per Haidar JCA (ketika itu):
- D

The Federal Court in the case of *Tham Kai Yau & Ors v PP* [1977] 1 MLJ 174 stated that intention is a matter of inference and went to state at p 176 thus:

- E 'The deliberate use by some men of dangerous weapon at another leads to the irresistible inference that their intention is to cause death... In actual practice however, it is frequently a matter of considerable difficulty to arrive at a conclusion by application of this principle in view of the close connection that the Penal Code makes between intention and knowledge. The provisions relating to murder and culpable homicide are probably the most tricky in the Code and are so technical as frequently to lead to a confusion. Not only does the Code draw a distinction between intention and knowledge
- F but subtle distinctions are drawn between the degrees of intention to inflict bodily injury.

[40] Kes *Sabarudin bin Non & Ors v PP* [2005] 4 MLJ 37 boleh dirujuk. Kes itu telah juga meneliti s 34 dan di antara lain menjelaskan seperti berikut:

- G To deal with the criminal liability of the 2nd and 3rd accused, it is necessary first to quote from two recent authorities to remind ourselves of the law governing s 34. In *Suresh v State of Uttar Pradesh AIR* [2000] SC 1344, Sethi J speaking for himself and Agrawal J said:

- H Section 34 of the Indian Penal Code recognizes the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention pre-supposes prior concert, which requires a
- I pre-arranged plan of the accused participating in an offence. *Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.* (Emphasis added.)

In *Hari Ram v. State of Uttar Pradesh* [2004] 3 LRI 523 (SC) which was decided by the Indian Supreme Court in August 2004, Arijit Pasayat J said:

‘Under the provisions of s. 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in s 34, when an accused is convicted under s 302 read with s 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch Pulla Reddy & Ors v State of Andhra Pradesh* AIR [1993] SC 1899, s 34 is applicable even if no injury has been caused by the particular accused himself. For applying s 34 it is not necessary to show some overt act on the part of the accused.

[41] Dalam kes *Yau Heng Fang v. PP* [1985] 2 MLJ 338 juga dijelaskan iaitu:

However, since the charge — both original and amended — against the appellant had reference to s 34 of the Penal Code, it is unnecessary for the prosecution to prove which particular stab wounds were inflicted by which assailant. So long as it is shown that the criminal act was done by one of the assailants in furtherance of a common intention of all, then liability for the crime would be imposed on anyone of the persons in the same manner as if the act were done by him alone (see *Mahbub Shah v King Emperor*).

[42] Dengan berpanduan apa yang telah dihuraikan di atas rumusan boleh dibuat bahawa di dalam kes di hadapan saya ini keterangan yang telah dibentangkan bagi kes pendakwa menunjukkan bahawa OKT1 dan OKT3 bersama-sama balik ke Capcon dan setelah itu sebagaimana dibutirkan di atas OKT2 kemudian telah turut serta. Mereka juga bersama-sama turut mencari orang yang kemudian telah dipukul setelah diekori jejak langkahnya di tempat letak kereta berdekatan dengan Kuantan Parade. Ketiga-tiga OKT1, 2 dan 3 telah dilihat bertindak terhadap si mati.

[43] Tindakan bersama itu pada pandangan saya termasuk dalam lingkungan ‘common intention’ (atau niat bersama) sebagaimana dimaksudkan di dalam konteks perundangan jenayah. Di peringkat ini harus pula diambil kira keterangan saksi SP8 iaitu Ketua Bahagian Forensik dan Hospital Tengku Ampuan Afzan. Beliau yang menjalankan bedah-siasat ke atas si mati, Mohd Saiful Bakar bin Ghazali, menjelaskan bahawa si mati tidak menunjukkan tanda penyakit atau kecacatan pada badan. Kecederaan yang diperincikan adalah berikut..

Tinggi 175cm; tiada tanda penyakit atau kecacatan pada badan.

Semasa pemeriksaan luaran didapati 10 kecederaan pada badan si mati.

Semua kecederaan ialah:

- (1) Luka lebam pada bahagian belakang lengan bawah kiri 3cm panjang (dorsal)
- (2) Luka calar jari kiri 4 sendi jari 2cm.
- (3) Luka calar pada hujung dorsal jari kanan ke 3.

- A** (4) Bengkak dan calar berganda (multiple abrasion and swelling bahagian kanan 4 x 3cm).
(5) Luka calar pada bahagian atas sebelah kiri — 2cm panjang Abrasion and swelling on left side of face.
- B** (6) Lebam kepada kedua-dua orbit mata.
(7) Lebam (depressed depression) pada bahagian belakang dalam kawasan occipital, occipital bawah tengkorak kepala.
(8) Abrasion berganda pada bibir atas 0.5.2 cm.
- C** (9) Pendarahan dari kedua-dua telinga.
(10) Pendarahan dari kedua-dua lubang hidung.
- [44] Di atas luka luaran, beliau juga memperincikan bahawa dalam pemeriksaan dalaman hampir ke tengkorak kepala menunjukkan berikut:
- D** Keretakan kepada kepala depressed fracture bahagian occipital.
Bahagian otak: bahagian ini ada luka contusion. Otak ini ditimbang 1100gm. Swollen — perdarahan di bahagian occipital subdural: bawah lapisan otak. Characteristic: associated with tengkorak death trauma.
- E** Anggota lain tiada cedera. Dalaman adalah kepala.
Sebab kematian:
Kesimpulan: Kematian ialah kecederaan di kepala oleh sebab trauma tumpul. Perdarahan subdural dan contusion punca kematian.
- F** Kecederaan lain:
Berdasarkan kepada kecederaan di kepala si mati telah kena hentakan berkali-kali di bahagian kepala, muka kiri dan muka sebelah kanan. Luka bahagian tangan dan jari ditafsir sebagai defence wounds. Object yang menyebabkan trauma: tumpul, object yang keras — tangan kosong tak boleh.
- G** [45] SP8 menjelaskan pemeriksaan dalaman bermaksud di kepala dan kesimpulan yang telah dibuat bahawa sebab kematian ialah kecederaan di kepala oleh sebab trauma tumpul, pendarahan subdural dan 'contusion' punca kematian. Mengikut SP8 berdasarkan kepada kecederaan di kepala beliau merumuskan si mati telah kena hentakan berkali-kali di bahagian itu.
- H** [46] SP8 telah ditunjuk eksh P18, P19 dan P22 dan beliau berpendapat alat-alat boleh mengakibatkan 'blunt trauma' berasaskan adanya retakan tengkorak yang diberi deskripsi 'depressed fracture' yang konsisten dengan disebabkan hentakan yang kuat.
- I** [47] Dengan pembentangan keterangan di atas wajar diingatkan saranan Mahkamah Persekutuan dalam kes *Balachandran v PP* [2005] 2 MLJ 301 mengenai tahap pembuktian pada penutup kes pendakwaan di mana diperkatakan per Augustine Paul JCA (ketika itu) di ms 315:

Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a prima facie case while S.182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. The submission made must therefore be ratiocinated against the background of the meaning of the phrase 'prima facie case' in s 180. Section 180(2) provides that the court shall record an order of acquittal if a prima facie case has not been made out while s 180(3) provides that if a prima facie case has been made out the accused shall be called upon to enter his defence. A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* (11th Ed) as:

A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

[48] Sebagaimana diuraikan di atas setelah meneliti secara keseluruhan keterangan dari pelbagai aspek yang wajar disentuh pada hemat saya perbuatan-perbuatan OKT1, OKT2, OKT3 bermula dari insiden di Esplanade dan ekoran dari itu perbuatan-perbuatan yang berakhir dengan si mati dipukul dan menyebabkan kecederaan adalah merupakan actus reus yang dibuat dengan niat untuk menyebabkan kecederaan kepada tubuh badan si mati yang mencukupi dalam keadaan biasa untuk menyebabkan kematian. Dengan yang demikian berdasarkan sebab-sebab yang telah diuraikan di atas saya telah memutuskan bahawa pihak pendakwa telah dapat membuktikan kes prima facie terhadap OKT1, OKT2, OKT3 di bawah s 300(c) KK.

A [49] Ketiga-tiga OKT diarah memasukkan pembelaan dan ketiga-tiga memilih untuk berbuat demikian dengan kenyataan bersumpah. Ketiga-tiga memberi pembelaan masing-masing seperti berikut:

[50] Pembelaan OKT1:

- B** (1) Keterangan OKT1 menunjukkan bahawa adanya berlaku insiden bertikam lidah antara beliau dan si mati. Keterangan itu juga mengesahkan bahawa selepas beredar dari Esplanade dia menyuruh OKT3 pergi ke Capcon untuk memanggil rakan-rakan lain dan mengambil senjata mempertahankan diri kerana kumpulan mangsa terlalu ramai;
- C** (2) OKT1 juga mengesahkan bahawa OKT3 telah disuruh memanggil SP7 dan OKT2 dan mereka beredar mencari mangsa atau si mati di atas tujuan yang dijelaskan sebagai tidak puas hati dengan sikap si mati.
- (3) Keterangan OKT1 mempertikaikan apa yang berlaku setelah terjumpa si mati dan dua rakan. OKT1 mengatakan si mati termasuk dalam kumpulan lima orang dan setelah berlaku sedikit lagi percakapan OKT1 menyatakan ia telah ditumbuk di dada dan bahu dengan tangan kosong oleh si mati;
- D** (4) OKT1 mengesahkan ada seorang antara rakannya sendiri yang menggunakan kayu snooker;
- E** (5) OKT1 memperakui ada menggunakan P22 dan membalingkan ke arah mangsa (si mati). Keterangan OKT1 sendiri juga memperakui bahawa P22 adalah berat. Mengikutnya tujuannya menggunakan P22 ialah untuk memastikan si mati tidak mengejarnya dan untuk tujuan lawan balik. Keterangan OKT1 juga menunjukkan si mati telah disepak;
- F** (6) P26 adalah laporan palsu dibuat atas sebab OKT1 ketakutan;
- (7) Keterangan itu juga memberi alasan bahawa dari awal tujuan mencari si mati adalah 'nak mencedera sahaja'.

[51] Pembelaan OKT2:

- G** (1) Pada keseluruhan pembelaan OKT2 mengesahkan ada seseorang yang dicari dan diekori setelah sekumpulan lelaki dilihat menuju ke arah Kompleks Teruntum;
- (2) Keterangan OKT2 juga mengesahkan apabila turun dari kereta yang kelihatan adalah tiga orang lelaki dan bukan berlima. Mengikutnya juga si mati telah menumbuk OKT1;
- H** (3) OKT2 memperakui ada menggunakan suatu besi yang diperolehi dari dalam kereta terhadap si mati. Walau bagaimanapun dinyatakan juga bahawa si mati telah cuba menepiskan besi dan besi itu dikatakan terpelanting. OKT2 memperakui besi digunakan tanpa mengira apa-apa akan terjadi;
- I** (4) Dalam soal-meny soal OKT2 juga memperakui bahawa pukulan adalah untuk mencedera dan bagi tujuan menolong rakan di atas sebab persahabatan. OKT2 faham bahawa adanya sesuatu pertengkaran berlaku;

- (5) OKT2 memperakui bahawa setelah menaiki kereta selepas kejadian memukul dan kelima-lima OKT1, 2 dan 3 bersama SP7 dan SP9 kembali ke tempat kejadian di mana mangsa (si mati) didapati tertunduk dan OKT2 telah menendang mangsa lebih kurang dua kali. **A**
- (6) Kenyataan OKT2 juga mengesahkan adanya OKT3 memegang kayu cue snooker dan OKT2 memberi keterangan menyokong bahawa mangsa dilihat kena pukul **B**
- (7) OKT2 memperakui telah sama-sama membantu dalam mengumpul besi dan pelbagainya untuk diletak di padang MPK;
- (8) Melalui soal-meny soal kenyataan OKT2 mengesahkan ada laporan polis dibuat oleh OKT1 seperti yang diuraikan sebelum iaitu bagi maksud mengatakan seolah-olah ada suatu ugutan yang mana laporan itu bukannya merupakan laporan yang benar. **C**
- [52] Pembelaan OKT3:
- (1) Keterangan OKT3 mengesahkan bahawa adanya pertikaman lidah antara OKT1 dan salah seorang antara dua lelaki di Esplanade. Ia juga mengesahkan adanya sesuatu yang ditangkap oleh si mati yang merupakan cabaran si mati bahawa si mati terdiri dari kumpulan yang lebih ramai dari mereka bertiga ketika itu; **D**
- (2) OKT3 juga mengesahkan bahawa OKT1 ada mencadangkan supaya mereka berjumpa semula dengan orang yang mencabar kerana OKT1 tidak berpuas hati; **E**
- (3) OKT3 mengesahkan beliau ada membawa dari Capcon sebatang kayu snooker, sebatang besi, sebilah kapak dan batang kayu snooker pendek; **F**
- (4) Mengikut OKT3 tujuan bergaduh dan membawa alat-alat itu “untuk mempertahankan diri jika perlu”, “mereka lebih ramai” dan untuk menakutkan mereka dan untuk menyelesaikan hal yang berlaku;
- (5) Keterangan OKT3 juga menyebut tentang pertengkaran mulut yang dikatakan berlaku antara OKT1 dan kemudian dikatakan dua dari tiga lelaki telah cuba menumbuk OKT1; **G**
- (6) OKT3 memperakui ada memegang kayu snooker ‘untuk mempertahankan diri dan menakutkan ketiga-tiga lelaki’.
- (7) Keterangan OKT3 tujuan mencari si mati adalah untuk menyelesaikan masalah yang dikatakan iaitu bahawa si mati telah menyatakan hendak menarik balik kereta (repossess) kereta yang digunakan OKT1; **H**
- (8) OKT3 tidak mengaku bahawa satu kayu snooker telah digunakan dengan cara sehingga ia hancur.

[53] Pembelaan ketiga-tiga tertuduh juga diberi pertimbangan dan sebagaimana telah dijelaskan juga di dalam kes *Balachandra* di ms 316:

As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be

- A** observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case.
- B** Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code.

[54] Didapati pada keseluruhan pembelaan yang dibangkitkan ialah:

- C** (i) niat untuk membunuh dinafikan dan tujuan menyerang mangsa (si mati) iaitu seorang yang telah menjadi sasaran adalah untuk menyelesaikan sesuatu
- (ii) tujuan alat-alat digunakan ialah untuk mempertahankan diri di atas sebab mengikut versi OKT1, 2 dan 3 si mati dan seorang rakan telah cuba menumbuk OKT1.

- D** [55] Semasa penghujahan sama ada di akhir kes pendakwaan atau pembelaan isu awal-awal lagi yang diutamakan ialah mengenai ketiadaan niat atau niat bersama, perbincangan untuk merancang sesuatu terhadap mangsa. Penganalisaan apa yang dicadangkan semasa kes pembelaan juga menunjukkan bahawa asas pembelaan ialah perbuatan yang diperlakukan oleh ketiga-tiga tertuduh secara spontan,
- E** semata-mata untuk mempertahankan diri sebagai reaksi terhadap apa yang diperkatakan oleh si mati di Esplanade iaitu dia ada rakan ramai.

- F** [56] Mengenai niat bersama seperti diulaskan di atas saya telah berpandukan kes-kes *Sabaruddin* selain dari kes yang dirujuk di peringkat kes pendakwaan iaitu *Namasiyiam v PP* [1987] 2 MLJ 336.

- G** [57] Isu mens rea yang dibangkitkan oleh pihak pembelaan boleh dirumuskan mengikut keterangan ikut keadaan (circumstantial evidence). Sebagaimana telah dihuraikan sebelum ini setelah OKT1 dan OKT3 meninggalkan Esplanade dan bergerak ke Capcon sudah mula wujud niat untuk mengambil beberapa alat dan tidak dinafikan pada keseluruhan siapa yang menjadi sasaran selain dari mangsa (atau si mati). Didapati tidak ada secebis kenyataan yang membayangkan si mati ada senjata. Apa yang dibayangkan ialah kemungkinan si mati akan membawa sekumpulan rakan untuk mencabar OKT1 dan OKT3 dan SP9 di Esplanade.
- H** Mengikut siasatan SP2, Si mati bukan juga merupakan 'car possessor'. Laporan polis yang dibuat selepas insiden memukul boleh dilihat sebagai kenyataan bahawa tujuan adalah untuk menjustifikasikan adanya sebarang ugutan. Alasan ini tidak munasabah oleh kerana sebagaimana telah dikemukakan oleh pihak Timbalan Pendakwaraya adalah lebih munasabah sekiranya apa yang disebutkan oleh si mati benar bahawa ia ingin menarik kereta, perkara itu dilaporkan kepada polis. Sebaliknya kenyataan yang
- I** dibentangkan menunjukkan bahawa adanya niat untuk bertindak balas walaupun alasannya adalah untuk mempertahankan diri.

[58] Kenyataan SP8 mengemukakan bukti bahawa peralatan yang digunakan semasa si mati dipukul menyebabkan kematian. Pihak pembelaan lebih merupakan

penafian. Didapati juga bahawa sememang ada ejekan daripada si mati yang telah ditujukan terhadap OKT1. Tetapi apa yang berlaku kemudian tidak boleh dianggap sebagai tindakan fizikal yang berpunca dari si mati. Nyata bahawa si mati dicari dan yang memulakan tindakan fizikal itu ialah OKT1, OKT2 dan OKT3 di mana si mati dan SP12 telah cuba mempertahankan diri. Kenyataan SP8 menunjukkan luka luaran yang konsisten dengan si mati cuba mempertahankan diri (defence wounds). Pembelaan membangkitkan persoalan seolah-olah adanya 'sudden fight'.

A

B

[59] Pihak pembelaan telah menggesa Mahkamah bahawa tanpa niat kematian yang diakibatkan dari pukul-memukul si mati lebih menjurus kepada pemaknaan s 299 KK dan bukan s 300 KK. Kes *Tham Kai Yau & Ors v PP* [1977] 1 MLJ 175 dan kes *PP v Aziz bin Mat Shah* [2004] 4 MLJ 127 telah dirujuk. Di dalam kes Aziz Mat Shah beberapa kes yang diputuskan di India juga telah dirujuk dan lebih khususnya kes *Virsa Singh v State of Punjab* [1958] SCR 1495. Di peringkat ini saya dapati perlu diulangi perbezaan yang telah digaris oleh Yang Arif Hakim Raja Azlan Shah FJ (ketika itu) di ms 176. Petikan ialah seperti berikut menghuraikan perbezaan di antara kesalahan bunuh (murder: s 300 KK) dan pematian salah (culpable homicide: s 299 KK):

C

D

Section 299, Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that.... the act is likely to cause death.

E

Section 300, Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death;(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and is sufficient in the ordinary course of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

F

...

A comparison that frequently arises in the application of s s 299 and 300 is the tenuous contention that section 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exceptions to s 300 apply, and if by reason of the absence of the necessary degree of mens rea an offence does not fall within section 300, it cannot be one of culpable homicide not amounting to murder punishable under 304, Penal Code, but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300, Penal Code apply, and (b) where the necessary degree of mens rea specified in s 299 is present, but not the special degrees of mens rea referred to in section 300, Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within s 300, Penal Code must necessarily fall within s 299, but all cases falling within s 299 do not necessarily fall within section 300.

G

H

I

- A ...
- Speaking generally, if the act must in all probability cause death, the offence is within s 300, Penal Code, and if the act is only likely to cause death, the offence falls within s 299, Penal Code.
- B [60] Seterusnya kes *Sainal Abidin bin Mading v PP* [1999] 4 MLJ 497 di ms 505 menyatakan:
- The Federal Court in the case of *Tham Kai Yau & Ors v PP* [1977] 1 MLJ 174 stated that intention is a matter of inference and went to state at p 176 thus:
- C The deliberate use by some men of dangerous weapon at another leads to the irresistible inference that their intention is to cause death In actual practice however, it is frequently a matter of considerable difficulty to arrive at a conclusion by application of this principle in view of the close connection that the Penal Code makes between intention and knowledge. The provisions relating to murder and culpable homicide are probably the most tricky in the Code and are so technical as frequently to lead to a confusion. Not only does the Code draw a distinction between intention and knowledge but subtle distinctions are drawn between the degrees of intention to inflict bodily injury.
- D
- E [61] Soal mens rea juga diulas dalam kes *Tan Chee Wee v. PP* [2004] 1SLR di ms 490 dan 491. Memandangkan Kanun Jenayah bagi ss 299 dan 300 di Singapura dan Malaysia adalah in pari materia kes di Singapura merupakan autoriti pengaruh untuk dipertimbangkan kes-kes yang telah diputuskan. Di sini kes *Tan Chee Wee* memberi keputusan yang relevan seperti berikut iaitu:
- F 42 The Prosecution had in this case proceeded on both limbs (a) and (c) of s 300. The key difference between these two provisions is one of intention. Section 300(a) provides that the act by which the death is caused must be done with the intention of causing death. In contrast, the mens rea required under s 300(c) is lower in that the intention need only be to cause bodily injury and that bodily injury so inflicted is sufficient in the ordinary course of nature to cause death. Section 300(c) thus envisions that the accused subjectively intends to cause a bodily injury that is objectively likely to cause death in the ordinary course of nature. There is no necessity for the accused to have considered whether or not the injury to be inflicted would have such a result. It is in fact irrelevant whether or not the accused did intend to cause death, so long as death ensues from the bodily injury or injuries intentionally caused. This was stated clearly in *Tan Joo Cheng v PP* [1992] 1 SLR 620 where S Rajendran J delivering the judgment of this court adopted the judgment of Bose J in *Virsa Singh v State of Punjab AIR (45) 1958 Supreme Court 465 at (16)* that:
- G
- H *The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present.* If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether
- I

he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. *Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.* (Emphasis added.)

A

43 As such, in examining whether s 300(c) has been made out, the court's approach to mens rea is only to determine whether the accused had intended to cause the injury that resulted in the victim's death. This approach has been articulated in *Virsa Singh v State of Punjab* at [12] that:

B

'To put it shortly, the prosecution must prove the following facts before it can bring a case under s 300 'thirdly';

C

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved. These are purely objectively investigations.

D

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

E

48 Indeed, it is not a necessary element of s 300(c) that the act be premeditated. It is sufficient that the intention was present even if it was formed instantly or on the spot. In this, we would respectfully adopt the words of Taylor J in *Ismail bin Hussin v PP* [1953] 19 MLJ 48 who stated at p 49 that:

F

The most probable explanation is that the accused's first statement to the magistrate is wholly true — that he saw a man and fired at once — on impulse — without any conscious or reasoned thought. *But however suddenly the intention was formed, the intention was to kill. That amounts to murder.* (Emphasis added.)

G

[62] Penjelasan dalam kes *Tan Chee Wee* selanjutnya diterimapakai dalam kes *PP v Sundarti Supriyanto* [2004] 4 SLR 659 di ms 661 seperti berikut:

H

Most recently, our law pertaining to s 300(c) PC has taken a shift in terms of the interpretation that has been given to it. The Court of Appeal in *Tan Chee Wee v PP* [2004] 1 SLR 479 at [43] held that:

In examining whether s 300(c) has been made out, the court's approach to mens rea is only to determine whether the accused had intended to cause the injury that resulted in the victim's death.

I

- A** Until recently, the interpretation our courts have attributed to s 300(c) PC has remained very much objective. However, the court in *Tan Chee Wee v PP* has taken a step towards a subjective interpretation of the said section. As such, I feel that some comment on the recent state of the law would be merited. I therefore that this opportunity to revisit the local judicial interpretation pertaining to s 300(c), up till the decision in *Tan Chee Wee v PP*, before coming to my decision.
- B** Essentially, much of our jurisprudence pertaining to s 300(c) PC has involved some discussion of the Indian Supreme Court's decision in *Virsa Singh v State of Punjab*. However, not many of our decisions have managed to capture the essence of the test in *Visar Singh*. Some of our former decisions have attributed an entirely objective interpretation to s 300(c) PC, interpreting it to mean that once it has been proved that an accused intended to cause
- C** some form of bodily injury, the remaining inquiry immediately becomes an objective one of whether the injury in fact inflicted was indeed sufficient to cause death. That being the case, even if an accused intended to inflict only a minor injury, it was sufficient to result in a conviction for murder so long as the injury actually inflicted was sufficient in the ordinary course of nature to cause death.
- D** I found this situation to sit very oddly with the test in *Virsa Singh*, which takes a different approach to interpreting s 300(c) PC. One needs only to turn to another Indian Supreme Court decision for a clear explanation of the test in *Virsa Singh*. In *Rajwant Singh v State of Kerala AIR (53) 1966 SC 1874*, it was held at 1878:
- E** 'As was laid down in *Virsa Singh v State of Pubjab*,... for the application of this clause it must be first established that an injury is caused, next it must be established objectively what the nature of that injury in the ordinary course of nature is. If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an *intention to inflict that very injury and not some other injury* and that it was not accidental or unintentional. If this is also held against the offender the offence of murder is established. (Emphasis added.)
- F** From this, it would appear that it was necessary to establish that an accused did not intend any other injury but that very injury that indeed caused the death of the deceased. With this principle in mind, I proceeded to analyse the application of s 300(c) PC on the facts of the present case.
- G** I scrutinized the Prosecution's submissions in relation to the test in *Virsa Singh* and found that the prosecution's division of the test into four limbs was largely accurate. However, I held that in terms of structure, it would have been more appropriate to lay out the test in this manner:
- H** (a) show that a bodily injury was present;
- (b) establish objectively the nature of the bodily injury and whether it was sufficient in the ordinary course of nature to cause death; and
- I** (c) prove that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of bodily injury was intended.
- In this way, the objective factual inquiry pertaining to the presence and the nature of the bodily injury [limbs (a) and (b)] is established first as a matter of course, before the subjective legal test as to whether the accused had an intention to inflict that particular injury that indeed caused the death of the deceased is applied. I found that it was important

- to maintain this clear separation between the two inquiries in order to avoid any confusion between the terms 'objective' and 'subjective'. The first inquiry is thus an objective forensic inquiry and the second, a judicial one. This then took me to my decision on the main issue, which is whether the accused was guilty of an offence under s 300(c) PC. **A**
- [63] Berpandukan kepada apa yang dihuraikan di atas, tidak dipertikaikan apakah butir terperinci mengenai kecederaan di badan dan di tengkorak. SP8 telah menjelaskan satu persatu dan merumuskan kecederaan di tengkorak yang dialami oleh mangsa adalah mencukupi dalam keadaan biasa untuk menyebabkan kematian. **B**
- [64] Dan sebagaimana dihuraikan di atas cara OKT1, OKT2 dan OKT3 menjejak langkah mangsa dan turun dari kereta dan seterusnya satu persatu mengacukan pukulan yang menunjukkan sememangnya pukulan itu bukan tidak disengajakan ('unintentional' atau 'accidental'). **C**
- [65] Pembelaan merupakan penafian mengenai niat dan adanya perancangan. Dengan itu perlu diteliti sama ada terdapatnya kenyataan yang boleh percaya (credible evidence) yang menunjukkan bahawa OKT1, OKT2 dan OKT3 telah memberi testimoni boleh percaya di mana 'exception' di bawah s 300 boleh dipakai. Tidak terdapat hujahan yang jelas dari pihak pembelaan mengenai perkara ini selain dari hujah yang lebih menekan kepada niat dan tiada rancangan. Namun melalui soal-menyual ada dibangkitkan elemen mempertahankan diri di mana dibayangkan seolah si mati yang cuba menumbuk OKT1 dahulu dan barulah tindakan balas diambil. **D**
- [66] Seperti dinyatakan sebelum ini didapati OKT1, 2 dan 3 telah melakukan actus reus iaitu perbuatan yang mana si mati telah menerima kecederaan. SP8 telah memberi kenyataan bahawa kecederaan itu boleh mengakibatkan kematian dalam keadaan biasa. **E**
- [67] Dari segi pembelaan peguambela-peguambela seolah-olah membangkitkan soalan bahawa tindakan OKT1, 2 dan 3 terhadap si mati terjatuh di dalam lingkungan kecualian (exception) yang terdapat dalam s.300 KK. Melalui cadangan sahaja dibayangkan bahawa pengecualian keempat mungkin wajar dipertimbangkan. Disebut dahulu apa yang telah diulas dalam *PP v Awang Raduan Awang Bol* [2005] 1 CLJ 654 mengenai isu ini: **F**
- It is to be noted that in that case the defence of 'sudden fight' was not brought up either in the High Court or the Court of Appeal. The defence was also not considered by both courts. However, it was brought up for the first time at the Privy Council. **G**
- The Privy Council held (headnotes):
- (3) a defence based upon an exception which the defendant has to prove may be raised for the first time before the Board if the Board considers that otherwise there would be risk of failure of justice. The test must be whether there is sufficient evidence upon which a reasonable tribunal could find the defence made out. If there be such evidence, the court of trial should have expressly dealt with it in its judgment and the Judicial Committee will deal with it on appeal, even though it has not been raised below. **H**
- I**

- A** (4) In the face of the evidence in this case, the appellant could not show that he had not taken undue advantage or acted in a cruel or unusual manner and therefore there was no need for the trial judges to refer to the defence of sudden fight in their judgment.

Lord Scarman, inter alia, said:

- B** Moreover, it would not, in our judgment, assist the administration of justice if there were to cast upon the High Court the duty of reciting in judgment only to reject every defence that might have been raised but was not.

The judgment went on to say as follows:

- C** We turn now to the question whether in the present case the evidence was such that the High Court could have reasonably concluded that the defence of sudden fight was made out. There was evidence that the act causing death was done without premeditation....

- D** In the present case there was evidence that suggested strongly the absence of any element of design or planning. There was also evidence that the blow, or blows, were struck 'in a sudden fight in the heat of passion upon a sudden quarrel', though there was also evidence (ie, going in search of the weapon, returning with it, and striking the deceased when he appeared to be neither aggressive nor on his guard) which suggested the contrary. But formidable difficulties face the appellant when he attempts to show that the act causing death was committed 'without the offender having taken undue advantage or acted in a cruel or unusual manner'. The appellant, who had been engaged in a fight with the deceased, ran to get a weapon and returned to attack the defenceless deceased with a truly murderous weapon, the exhaust pipe, a photograph of which we have seen. The evidence of the assault shows that the deceased was taken by surprise and attacked with a very unusual and unexpected weapon, a heavy blow on the head from which could reasonably be expected to be lethal....

- E** In the fact of the evidence, we do not see how the appellant could prove that he had not taken undue advantage or acted in a cruel or unusual manner.

- F** There was therefore, no need for the trial judge to refer to the exception in judgment. Indeed, had the trial been a jury trial, we doubt whether the judge would have considered it necessary to put the defence to the jury. In our judgment, therefore, the appellant's argument based on the exception of 'sudden fight' fails.

- G** Having said that, the Privy Council dismissed the appeal which, in effect, means that the conviction was affirmed, even though on the facts, in our view, the case for the appellant in that case was much stronger than in this case.

- H** In the present case, like in *Mohamed Kunjo*. In that case, at least the defence was raised by the appellant before the Privy Council. However, we are prepared to accede that the Court of Appeal was not prevented from considering that defence but, on condition that there must be sufficient evidence upon which a reasonable tribunal could find the defence made out.

- I** [68] Perkara 'sudden fight' telah juga dibincangkan dalam kes *Tan Chun Seng v PP* [2003] 2 SLR 511 seperti berikut:

15 The statutory defence of sudden fight resides in Exception 4 to s 300 of the Penal Code (Cap 224). Exception 4 states:

Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

A

Explanation — It is immaterial in such cases which party offers the provocation or commits the first assault.

- 16 There are three main ingredients which prompt the operation of this defence:

B

- (a) sudden fight, heat of passion, sudden quarrel;
- (b) absence of premeditation;
- (c) no undue advantage or cruel or unusual acts.

- 17 Ideally, the defence should have been addressed at the trial stage. Murder carries with it the death penalty. To this end, the courts are called upon to perform an exacting study of whether any of the defences — whether partial or full — to murder are operative in the case at hand. This duty is as applicable to the Court of Appeal as it is to the trial court.

C

- 18 Two Malaysian Court of Appeal decisions — *Abmad Raduan bin Awang Bol v PP* [2003] 1 MLJ 372 and *Haji Talib v PP* [1969] 1 MLJ 94 — proposed that where there was evidence from the record of proceedings that a defence of sudden fight ought to have been addressed by the trial judge, but was not, the proper way for the appellate court to decide the case was to give the benefit of the doubt to the appellant. The Malaysian Court's reasoning was that the proper forum for the assessment of the sudden fight defence's applicability was the trial court. The Court of Appeal, in their view, was ill-equipped to make this finding of fact.

D

E

- 19 We were of the view that the best forum to decide whether or not an exception to s 300 existed was the trial court, but where for some reason the defence was not pleaded and addressed at the trial court, we were of the view that the Court of Appeal was still in a very credible position to make a decision on the defence's operation. This is especially so when the Court of Appeal has all the evidence it needs to come to a decision on the operation of the defence. In such situation, there is no need to give the benefit of the doubt to the appellant since the evidence can be studied afresh.

F

[69] Mahkamah dalam kes *Tan Chee Wee v PP* dalam meneliti aspek ini menyatakan:

G

Exception 4 to s 300

- 53 However, sudden fight is only a partial excuse in that the accused is regarded as being less blameworthy because his judgment was clouded by the dust of conflict or inflamed by the heat of passion. It does not completely exculpate him from the consequences of his action.

H

- 54 This court recently had the opportunity in *Tan Chun Seng v PP* [2003] 2 SLR 506 to examine the operation of the defence of sudden fight. In that case, we stated at [16] that:

There are three main ingredients which prompt the operation of this defence:

I

- (d) sudden fight, heat of passion, sudden quarrel;

- A** (e) absence of premeditation;
(f) no undue advantage or cruel or unusual acts.
- ...
- B** 56 The word 'fight' is not defined in the Penal Code. However, the word "fight" is also used in s 159 of the Penal Code which relates to the offence of affray. It states:
Affray.
159 When two or more persons, by fighting, in public, disturb the public peace, they are said to 'commit an affray'.
- C** 57 Our High Court had in relation to this provision stated in *Eldon v PP* [2001] 1 SLR 710 at [49] that:
- D** The gist of the appellant's case was that he had been the victim of Mr Ng's assault and that he had not responded in like manner. I found this suggestion difficult to accept. A man who is being assaulted would certainly not lie passively and do nothing in response. To expect a court to believe that this was the case was unrealistic at best. Indeed, the appellant's argument was that he was acting in the exercise of his right of private defence. This postulated that he had indeed responded to Mr Ng's assault. *If this was the case, then it could be said that a 'fight' took place and therefore that the offence of affray was made out. A 'fight' has been defined simply as a 'bilateral transaction in which blows are exchanged' (Bhagwan Munjaji Pawade v State of Maharashtra 1978 SCC (Cr) 428).* The defence of private defence, if made out, would defeat the argument that there had been no fight because it was based upon there being some culpable conduct on the part of an accused person which was justifiable in the circumstances (Emphasis added.)
- E**
- F** 58 This definition of 'fight' must be contrasted to that given in the case of *Hans Raj Singh v Emperor AIR (33) 1946 Lahore 41* where Mohammad Sharif J took a different position when he stated at 43 that:
- No authority was cited to show that in order to apply exception 4 it is essential that there should have been blows on each side. A word or a gesticulation may be as provocative as a blow.
- G** [70] Setelah menimbangkan pembelaan yang diujahkan didapati pihak pembelaan di atas imbangan kebarangkalian gagal menimbulkan apa-apa kenyataan yang menunjukkan adanya pertikaian di mana kecualian yang keempat terpakai di dalam kes ini.
- H** [71] Setelah meneliti kes pada keseluruhan didapati bahawa pihak pendakwaan telah dapat mewujudkan suatu kes ke tahap tanpa keraguan yang munasabah. Dengan itu ketiga orang yang kena tuduh didapati bersalah di atas tuduhan.
- I** [72] Dalam rayuan untuk kurangkan hukuman, didapati ketiganya tiada rekod kesalahan jenayah. OKT1 ketika ditangkap baru bekerja enam bulan. OKT2 semasa kejadian masih belajar dan OKT3 tidak ada sebarang pekerjaan.

[73] Ketiga mereka disabitkan di atas kesalahan di bawah s 300(c) Kanun Keseksaan dan dikenakan hukuman gantung seperti diperuntukkan di bawah s 302 KK.

Ketiga-tiga tertuduh disabitkan di bawah s 300(c) Kanun Keseksaan dan dihukum gantung.

Reported by Sally Kee

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